NO. 33295

IN THE SUPREME COURT OF APPEALS AFOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

GRANDEOTTO, INC.,

Appellant,

v.

CITY OF CLARKSBURG,

Appellee.

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 04-C-640

BRIEF OF APPELLEE, CITY OF CLARKSBURG

Gregory A. Morgan, Esquire
WV Bar No. 2629
Young Morgan & Cann, PLLC
363 Lee Ave.
Clarksburg, WV 26301
(304) 624-5687

Counsel for Appellee

TABLE OF CONTENTS

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER COURT

This is the brief of the Appellee and Defendant below, the City of Clarksburg. This consolidated proceeding is an appeal by Grandeotto, Inc. from two Orders of the Circuit Court of Harrison County granting summary judgment to the City. The first, in Civil Action 04-C-640-3, was an "Order Granting Summary Judgment on Count II, the Sole Remaining Count of Plaintiff's Amended Complaint" entered on March 1, 2006 by Judge James A. Matish. The Appellant had previously voluntarily dismissed the three other counts of the original Complaint. The second, in Civil Action 06-C-108-2, was an "Order Converting Defendant's Motion to Dismiss Into Motion for Summary Judgment and Granting the Defendant's Motion" entered on May 25, 2006 by Judge Thomas A. Bedell.

The Appellant filed Petitions for Appeal seeking this Court's review of each of these Orders of the Circuit Court. This Court has granted the Petitions, and consolidated them into this proceeding.

STATEMENT OF FACTS

Judge Matish's Order entered on March 1, 2006 granting summary judgment to the Appellee succinctly sets forth the basic facts as follows:

> Grandeotto, Inc. owns a certain parcel of property facing South Third Street in Clarksburg, West Virginia known as 110-112 South Third Street. Prior to the conveyance between the parties in this case, Plaintiff Grandeotto also owned another parcel of property located directly behind its South Third Street Property, but extending between Traders Avenue and West Pike Street. This property is essentially a rectangle, 49 feet by 182 ½ feet and will be referred to as the "Traders Avenue property." Located on this "Traders Avenue property" at the southern end and extending across the full width of the lot is a building known as "Rocky's Shoe Shop." At the northeast corner of the same lot is a small white building previously used as a parking lot attendant's building.
>
> By letter dated November 12, 2003, the City of Clarksburg, through its city attorney, Gregory A. Morgan, sent a letter to Mid-City Land Co. indicating that the City would be acquiring the "Traders Avenue property" for a parking garage. The Plaintiff, Grandeotto Inc. is the successor by merger to Mid-City Land Co., Inc.
>
> Plaintiff [Grandeotto] then had its attorney to draft a right-of-way agreement which is of record in the office of the Clerk of the County Commission of Harrison County, West Virginia in Deed Book No. 1359, at page 432. [1]

---

[1] See also W. Va. Code § 36-3-5a.

(a) Any deed or instrument that initially grants or reserves an easement or right-of-way shall describe the easement or right-of-way by metes and bounds, or by specification of the centerline of the easement or right-of-way, or by station and offset, or by reference to an attached drawing or plat which may not require a survey, or instrument based on the use of the global positioning system which may not require a survey: *Provided*, That oil and gas, gas storage and mineral leases shall not be required to describe the easement, but shall describe the land on which the easement or right-of-way will

Said right-of-way agreement is dated November 25, 2003 and is by and between Grandeotto, Inc. as both the grantor and grantee and was executed on December 23, 2003, and was recorded on January 8, 2004.

Plaintiff [Grandeotto] then, on its own and without the assistance of counsel, drafted a second right-of-way agreement which his of record in the aforesaid Clerk's office in Deed Book No. 1361, at page 774. Said right-of-way agreement is dated March 26, 2004 and is by and between Grandeotto, Inc. as both grantor and grantee and was executed on the same date with recordation on March 29, 2004. This second right-of-way is identical in all respects to the first right-of-way except that the width of the pedestrian right-of-way is 10 feet instead of 5 feet.

By Agreement dated April 1, 2004, the Plaintiff, as seller, agreed to sell to the City of Clarksburg, as purchaser, the "Traders Avenue property" for the sum of $220,000.00, subject to all exceptions, covenants, restrictions and easements contained in the prior instruments of record including the two aforesaid rights-of-way (hereinafter "COS").

By deed dated June 8, 2004, of record in the aforesaid Clerk's office in Deed Book No. 1364, at page 350, the Plaintiff, with covenants of general warranty[2],

---

be situate by source of title or reference to a tax map and parcel, recorded deed, recorded lease, plat or survey sufficient to reasonably identify and locate the property on which the easement or right-of-way is situate: *Provided, however,* That the easement or right-of-way is not invalid because of the failure of the easement or right-of-way to meet the requirements of this subsection."

[2] "A deed with a covenant of general warranty estops the grantor from asserting against the grantee any title to the land he had or claimed at the time of its execution..." Syl. Pt. 8, Summerfield v. White, 54 W.Va. 311, 46 S.E.154 (1903).

conveyed said real estate to the Defendant containing the same exceptions set forth in the aforesaid agreement to sell, including the two rights-of-way.

Neither the Agreement dated April 1, 2004, nor the deed conveying the real estate to Clarksburg, dated June 8, 2004, contains any provision or mention whatsoever regarding the "Rocky's" Building, in any way whatsoever, and certainly do not contain any provision requiring the demolition of that building as a part of the consideration for the transaction. The sole and only consideration was the payment of Two Hundred Twenty Thousand Dollars ($220,000.00) cash at closing. Nor does either document contain any provision whatsoever restricting or obligating the City's eventual use of the property. The price paid for the property exceeded the City's appraisal by 10% or Twenty Thousand Dollars ($20,000.00).

The City has not demolished the Rocky's Building, but is currently constructing its new parking facility on the property acquired form the Appellant, along with the adjacent properties for that purpose. It is expected that the facility will be completed during summer 2007.

POINTS AND AUTHORITIES RELIED UPON

Cases

Statutes

Other Authorities

DISCUSSION OF LAW

I. The Circuit Court Correctly Ruled That The Easements(s) Are Void.

Standard of Review

This Court should uphold the summary judgment orders granted by Judges Matish and Bedell, respectively, in the two proceedings below because the pleadings, depositions, interrogatories and admissions on file demonstrate that there are no genuine issues of material fact presented on either issue, and the City of Clarksburg was, accordingly entitled to judgment as a matter of law. "A motion for a summary judgment should be granted if the pleadings, exhibits, and discovery depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to a judgment as a matter of law." *Wilkinson v. Searls*, 155 W. Va. 475, 184 S.E.2d 735 (1971). "Roughly stated, a 'genuine issue' for purposes of subsection (c) [of Rule 56] is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that part. The opposing half of a trialworthy issue is present where the nonmoving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under applicable law." *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). Where there is no showing of a "material fact," and a moving party is entitled to judgment as a matter of law, summary judgment is appropriate, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); *Powderidge Unit Owners Ass'n v. Highland Properties Ltd*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

Appellant Failed To Carry Its Burden Of Proving The Existence Of The Easements By Clear And Convincing Evidence.

The beginning point of this discussion must be whether the Appellant has ever had any easement(s) whatsoever. Both judges below found that the existence of the easements was the key

question in each of the civil actions, and that the other issues raised by the parties turned, in large part, upon the resolution of this issue. The Appellant bears a heavy burden in this regard: "The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof." Syl. Pt. 10, *Law v. Monongahela Power Company*, 210 W. Va. 549, 558 S.E.2d 349 (2001). As Judge Matish correctly stated:

> The West Virginia Supreme Court of Appeals has held that "[t]he burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof." Syl. Pt. 1, Berkeley Development Corp. v. Hutzler, 159 W.Va. 844, 229 S.E.2d 732 (1976). The Supreme Court has further explained that "[a]n easement may be defined as the right one person has to use the lands of another for a specific purpose... Kelly v. Rainelle Coal Co., 135 W.Va. 594, 604, 64 S.E.2d 606, 613 (1951) *overruled in part on other grounds by* Kimball v. Walden, 171 W.Va. 579, 301 S.E.2d 210 (1983). Matish Order granting summary judgment – March 1, 2006

A. The Easements Are Void As A Matter Of Law.

Judge Matish went on to properly find that the easements are void as a matter of law for two reasons: First, he found that the two virtually identical easement agreements were so ill-defined and ambiguous as to both the width and location of the sewer line and the pedestrian access, as to be invalid, particularly when considered with the broad interpretation which Petitioners indicated that they intended to assert as to their meaning (See footnote 4 of the March 1, 2006 Order). Second, the Court found that because Grandeotto, Inc., was both grantor and grantee of the two easement agreements, the doctrine of *Merger* applies, and the easements were extinguished upon their creation.

Judge Bedell, in considering the issue of the validity of the two easements, agreed with Judge Matish, as set forth in "Conclusion of Law" Number 9 in his May 25, 2006 Order, in connection with the Appellant's fraud claims. "This is because, as Judge Matish found in Civil Action 04-C-340-3, the rights of way are invalid on multiple levels."

1. The Easements Are Void As A Matter Of Law.

1. The Easements Are Void Because They Are Unreasonably Ambiguous As To Both Width And Length.

Judge Matish clearly and succinctly found that because the easement documents [3] are ambiguous as to both width and length, and because they do not comply with the express provisions of West Virginia Code § 36-3-5a), that they are impermissibly ambiguous and vague and are therefore void. In its Order, the Circuit Court observed that the grant of the sewer line easement in each document "states that the right of way is to be '**located in the discretion of said Grantee**' to Pike Street over 'a reasonable route as necessary' to connect to the sewer system at such location '**as determined by Grantee**.'" Matish Order pp. 5-6 [emphasis in original].

This language requires a future determination of both the width and length of the right of way. Judge Matish properly found that this defect, as well as the uncertainty created by the two documents as to the width of the pedestrian rights of way, and the absence of either a plat, metes and bounds description or a centerline description make it unreasonably difficult, if not impossible, to determine from the language of the instruments the location of the easements. *Highway Properties v. Dollar Savings Bank*, 189 W.Va. 301, 431 S.E.2d 95 (1993). The court further concluded that since

---

[3]The relevant language is as follows:

"1. Grantor Grandeotto Inc. grants and conveys a right-of-way to Grantee Grandeotto, Inc. across the property described in a deed from Frank K. Abbruzzino, et al. by deed dated September 9, 2002 recorded in Deed Book No. 1347, at page 52 for a sewer line and for pedestrian ingress and egress to the back of the property owned by Grandeotto, Inc. being 110-112 South Third Street, Clarksburg Harrison County, West Virginia.

2. The right-of-way for the sewer line shall go from the back of the property of Grandeotto, Inc. at 110-112 South Third Street to be located in the discretion of said Grantee to Pike Street over a reasonable route as necessary to connect to the sewer system at such location as determined by Grantee.

3. The right of way for pedestrian travel shall connect with Traders Alley and shall connect with Pike Street across said property purchased form Abbruzzino, et al. And shall be 10 feet wide for the purpose of ingress and egress for any and all purposes to the rear of the building of Grantee located at 110-112 South Third Street."

Appellant drafted both of these documents, the ambiguities contained therein must be construed against it, and "such construction results in the failure of the rights of way to exist." Matish Order p.6.

2. The Easements Do Not Exist By Reason Of The Doctrine Of Merger.

The two easement documents which Grandeotto, Inc. purported to grant to itself were void upon their execution. The doctrine of *merger* holds, in part, that no one can use part of his own estate adversely to another part, in other words, no person can hold both a dominant and servient portion of their own estate existing at the same time. See *Black's Law Dictionary*, 6th Ed. (Merger. *Property interests.* "It is a general principle of law that where a greater estate and a lesser coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be *merged*; that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is *merged* in the inheritance, and shall never exist any more. Similarly, a lesser interest in real estate merges into a greater interest when lessee purchases leased property.") See also *Pingley v. Pingley*, 82 W. Va. 228, 95 S.E. 860 (1918) ("The acquisition of the fee-simple title to a tract of land, to which is appurtenant an easement over an adjoining tract, by the owner of such adjoining tract, extinguishes such easement."); *Perdue v. Ballengee*, 87 W. Va. 618, 105 S.E. 767 (1921) ("The acquisition of a tract of land, over which there exists an easement appurtenant to an adjoining tract, by the owner of such adjoining tract, extinguishes such easement."); and *Henline v. Miller*, 117 W. Va. 439, 185 S.E. 852 (1936) ("When the owner of a dominant estate acquires the fee-simple title to the servient estate, an easement appurtenant to the dominant estate is extinguished.")

There is no dispute that at the time Grandeotto executed the right-of-way agreements, Grandeotto owned both the Traders Avenue Property and the Third Street Property. The identical language of the two easement agreements purported to create a right-of-way for "a sewer line and pedestrian travel for the benefit of the property located at 110-112 South Third Street [the Third Street

Property]" across the Traders Avenue Property. Because the agreements purported to create a servient estate (the right-of-way across the Traders Avenue Property), and benefiting a dominant estate (the Third Street Property), in one owner, each purported easement was extinguished and annihilated immediately at the time of its execution. Accordingly, the Circuit Court correctly found that the two easements are unenforceable as a matter of law.

This point is so overwhelmingly clear that Appellant concedes the applicability of the doctrine of *merger*. At the outset of its argument, Appellant states as follows: "There is a body of law which supports the notion stated by the Court that the rights-of-way of Grandeotto, Inc. merged into Grandeotto's fee interest prior to its conveyance into the City" (Brief of Appellant at page 21). In fact, the Appellant does not make any real argument that merger does not apply in this case; rather, the Appellant states that the [merger] "issue is not dispositive" because regardless of the validity of the two merger agreements, the easements were created by either grant, or by reservation or, if neither of those, by *estoppel*. In other words, Appellant's contention is that the Appellant's interest in the easements it claims arise in some other way. Accordingly, the relevant facts are not disputed in this regard, and there is no argument as to the substance of the law regarding the doctrine of *merger*.

3. Appellant failed to demonstrate that any easement across the Traders Avenue property was created by reservation, implication, prescription, nor estoppel.

A. Grandeotto did not reserve easements to itself.

The words contained in the June 8, 2004 deed are clear and unambiguous:

> The sale and conveyance of the Property shall be and is subject to the following:
>
> a) To any state of facts an accurate survey of the Property may disclose; and
>
> b) To all exceptions, reservations, covenants, restrictions and easements contained in prior instruments now of record pertaining to the Property, including, without limiting the generality of the foregoing, those two (2) certain right-of-way agreements, one dated the 25th day of

November, 2003, of record in the aforesaid Clerk's Office in Deed Book No. 1359, at page 432, and one dated the 26th day of March, 2004, of record in the aforesaid Clerk's Office in Deed Book No. 1361, at page 774.
Deed dated June 8, 2004.

Clearly, there are no words of reservation contained in the quoted language. Rather, the language simply referenced the two documents of record, along with all other prior matters of record. As Judge Matish ruled ". . in order to create a reservation, such reservation must be expressed in certain and definite language. Syl. Pt 2 *G & W Auto Ctr., Inc. v. Yoursco,* 167 W.Va. 648, 280 S.E.2d 327 (1981), cited by *Highway Properties v. Dollar Savings Bank*, 189 W.Va. 301, 431 S.E.2d 95 (1993)." Matish Order at 5.

It is respectfully suggested that no reasonable interpretation of the deed's language can meet this standard. These documents, clearly do not grant or reserve the easements, but simply reference or acknowledge that the documents are of record. The Appellant finds it significant that the deed was drafted by the attorney for the Appellee. In order for this to have any significance, it must first be determined that some ambiguity be found in the particular provision in issue.

Such reference in the Deed, in and of itself, does not create an enforceable easement across the Traders Avenue Property. "An acknowledgement in a deed of the existence of an easement is not equivalent to an intent to create an easement." *Ozyck v. D'Atri*, 206 Conn. 473, 538 A.2d 697 (1988). Furthermore, a right-of-way constitutes an exception or reservation to the full fee-simple interest in the servient property. *Highway Properties v. Dollar Savings Bank*, 189 W. Va. 301, 431 S.E.2d 95 (1993). And "[t]o except or reserve any part of any estate in land granted by deed, a provision in the deed for that purpose must be certain and as definite as an effective granting clause in such deed." *Bennett v. Smith*, 136 W. Va. 903, 69 S.E.2d 42 (1952).

Neither the COS nor the June 8th Deed contain a clause reserving a right-of-way across the Traders Avenue Property. (Of course, the terms of the COS were merged into the deed upon closing). The COS and June 8th Deed simply acknowledge the existence of the two previously recorded right-of-way documents. As noted above, due to the doctrine of Merger, not even the Appellant argues that these documents created valid easements as a matter of law. Accordingly, the mere acknowledgment of these admittedly invalid documents in the June 8th Deed cannot create (or revive) the easements.

Judge Matish properly found that ". . . the mere fact that the deed and agreement to sell *acknowledged* that the two rights-of-way had been previously recorded does not equal an express reservation or grant of any rights-of-way. In fact, there is no such language expressly reserving said rights-of-ways in the property. " Moreover, mere acknowledgment of the rights-of-way being recorded does not automatically create a valid right-of-way, nor does it negate a right-of-way's invalidity due to vagueness in the original conveyance or by the doctrine of merger." (March 1, 2006 Order, pg. 7)

B. No easement was created by implication.

Grandeotto next argues that the provision in the Contract of Sale and/or the June 8th Deed that the conveyance of the Traders Avenue property was "subject to" the invalid easement agreements, created rights-of-way across the Traders Avenue Property by implication. This position is not supported by the words of the deed, nor by the applicable law.

Grandeotto must, to sustain this argument, must, to sustain this argument, establish by clear and convincing proof that at the time the Traders Avenue Property was conveyed to the City said right-of-way was apparent, continuous and necessary for the Third Street Property. See *Miller v. Skaggs*, 79 W. Va. 645, 91 S.E. 536 (1917) ("To raise an implied reservation or grant of an easement the existing servitude must at the time of the deed be apparent, continuous and strictly necessary."). See also *Stuart v. Lake Washington Realty Corporation*, 141 W. Va. 627, 92 S.E.2d 891 (1956) ("The general rule is that

there is no implied reservation of an easement when an owner conveys a part of his land over which he has previously exercised a privilege for the benefit of the land which he retains unless the burden upon the land conveyed is apparent, continuous and strictly necessary for the enjoyment of the land retained.").

Accordingly, Grandeotto cannot show, based on the undisputed facts, that said right-of-way was apparent, continuous, and necessary for the Third Street Property. An apparent right-of-way is one where the facts and circumstances, fairly construed, disclose its existence. *Miller* at page 537. Furthermore, "apparent easements are defined as 'Those the existence of which appears from the construction of condition of one of the tenements, so as to be capable of being seen or know on inspection.'" *Miller*, citing *10 Am. & Eng. Ency. Law, 405*, at page 537. Grandeotto's alleged right-of-way is not apparent, at least not across the entire Traders Avenue Property as Grandeotto claims, because it is physically blocked by the Rocky's building.

Although necessity, in terms of an implied reservation, need not be strict necessity, but at least that of reasonable necessity, as distinguished from mere convenience, Grandeotto's alleged right-of-way does not even meet this threshold. Grandeotto's stated purpose for the alleged right-of-way is for "a sewer line and pedestrian travel for the benefit of the property located at 110-112 South Third Street." This purpose is more than adequately met by the existence of the right-of-way from the Third Street Property to Pike Street, and these is no reason that such right-of-way would have to extend to Traders Avenue from the Third Street Property, especially with Rocky's Shoe Shop blocking the way.

As Judge Matish concluded:

> ". . .[It] certainly cannot be disputed that the alleged rights-of-way were not continuous in nature, at least with respect to any such right-of-way through the "Rocky's Shoe Shop," as the building has long been in existence with no right-of-way being exercised through it.[4] Second, the rights-of-way are not apparent, as it is not apparent by looking at the "Traders Avenue property" that a right-of-way would extend to Traders

[4 Although Plaintiff has not complained about the small white parking lot attendant's building at the northeast corner of the "Traders Avenue property," nevertheless, it would partially block the Plaintiff's access along the eastern boundary if that is where the rights-of-way were located.]

Avenue given the fact that the "Rocky's Shoe Shop" stands in the way of the alleged pedestrian right-of-way between Traders Avenue and Pike Street. Lastly, the alleged rights-of-way are not of necessity as the Plaintiff's stated purpose for the alleged rights-of-way are for a sewer line and pedestrian travel to and from the rear of its Third Street property. The Plaintiff has access to its Third Street property from South Third Street and from Pike Street and Traders Avenue via South Third Street.

(Matish Order, pp. 7-8)

C. No Easement was created by prescription.

For the asserted rights-of-way to have been created by prescription, said rights-of-way must have been efffectively used open and notoriously for ten years. Since there is no assertion that the asserted rights-of-way were not created prior to 1994, they cannot possibly have been created by prescription. The Petitioner does not even assert any easement by prescription.

D. The rights-of-way asserted by Grandeotto were not created by estoppel.

To sustain its position that the easement(s) were created by estoppel, Grandeotto is required to show, by clear and convincing evidence, that there "exist(ed) a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive of facts, party to whom it was made must have been with knowledge or means of knowledge of real facts; it must have been made with intention that it should be acted on; and party to whom it was made must have relied on or acted on it to its prejudice." *Jolynne Corporation v. Michels*, 191 W. Va. 406, 446 S.E.2d 494 (1994). Grandeotto has failed to show, or even allege in any way, that there was any false representation regarding the alleged easements by the City; nor that the City made such a representation to Grandeotto while in full knowledge that such representation was false; nor that the City made such a representation with the intention of Grandeotto acting upon the representations; nor that Grandeotto relied upon such a presentation to its prejudice. See also *Jones v. Beavers*, 221 Va. 214, 269 S.E.2d 775 (1980), ("Burden was on landowners claiming easement on boat landing to establish their entitlement to that easement by evidence setting up an estoppel against the grantor; mere fact that deeds made reference to a recorded plat

showing a waterfront area marked "landing" was insufficient to establish an easement in favor of the landowners."); and *Summerfield v. White*, 54 W. Va. 311, 46 S.E. 154 (1903), (Syl. Pt. 8. "A deed with covenants of general warranty estops the grantor from asserting against the grantee any title to the land he had or claimed at the time of its execution, and also passes to the grantee any title to the land that the grantor may acquire afterwards.").

The City of Clarksburg made no representation to the Petitioners whatsoever regarding the existence or nonexistence of their own easements. Rather, the City did no more than acknowledge the existence of documents, along with all other matters of record that may have affected the title, which the Petitioners had caused to be placed of record.

Appellant spends a great portion of its brief asserting that "misrepresentations" were made by or on behalf of the City, prior to the sale of the Traders Avenue property. The fatal flaw in its argument is that all the "representations" so alleged relate as to the City's plans with regard to whether or not the Rocky's Building would be demolished. None of these so-called representations have anything whatsoever to do with the validity or creation of the easement agreements, which were prepared, executed and recorded by the Appellant itself, with no involvement by the City whatsoever. Such allegations are not sufficient, as a matter of law, to demonstrate that any easement was created by *estoppel.*

While the City has refused to recognize the existence of the easement(s), the Appellant is asking this Court to presume, as a matter of fact, that the City had foreknowledge of something that was to happen with in the future: that the easements would be declared invalid, and then proceeded to conceal this knowledge from the Appellant to induce it to sell the property.

The Appellant is confusing the validity of the easement(s) with a (nonexistent) promise by the City to demolish the Rocky's Building. In this action, Appellant seeks specific performance of the building's demolition by the City in its prayer for relief, based on nothing more than its claims for the

rights-of-way. Of course, there is no provision in the COS nor the deed which mentions, much less which specifies that the City is obligated to demolish the Rocky's Building. As the Appellant takes great pains to point out, the Parking Facility Project has greatly evolved form the original proposal to its final design, and accordingly Appellant's assertions that the City made factual representations as to the facility's final design are misplaced and are clearly immaterial to the issues before the Court.

The Appellant's attempt to rely as the basis of its *estoppel* claims (as well as its *fraud* claims) on documents which were created as a part of the design process of the project particularly with regard to the City's decision whether or not to demolish the Rocky's Building, but that process had nothing to do with the validity or invalidity of the invalid easement documents.

II. The Circuit Court Properly Dismissed The Appellant's Fraud Claims.

A. The Cause of Action For Fraud Is Based On The Validity Of The Easements.

Appellant's Complaint in Civil Action 06-C-108-2 was based upon the premise that the two easement documents cited in its Complaint are valid instruments and are, in some way, binding on the parties. Unfortunately, as hereinabove extensively addressed, Judge Matish properly ruled that such easements are, in fact, not binding on the parties and have never been, for the simple reason that they were void from the time of their execution by the Appellant for the reasons set forth in Judge Matish's order entered on March 1, 2006 and as set forth hereinabove.

Moreover, in both that Complaint, and in its Brief, the Appellant places great significance on the language in the contract of sale and the deed June 8, 2004 that the conveyance of the subject lot is "subject to" the (invalid) easement documents. This reliance is misplaced and, intentionally or unintentionally, disregarded Judge Matish's ruling that "...the mere fact that the deed and agreement to sell acknowledged that the two rights of way had previously been recorded does not equal an express reservation or grant of any rights-of-way." (Matish Order dated March 1, 2006 at 7) (emphasis in

original). Appellant cannot rely on this language to sustain its claim to the rights of way, because those documents did nothing more than acknowledge the instruments that were of record.

B. The Circuit Court Properly Granted The City Summary Judgment Dismissing Appellant's Claims For "Actual Fraud."

Appellant first asserted its fraud claims in Civil Action 04-C-640-3, which it voluntarily dismissed by Order entered February 15, 2006. In Civil Action 06-C-108-2 it reasserted the actual fraud claim and unveiled a newly asserted cause of action of "negligent misrepresentation" Appellant's Complaint in this case failed to state a fraud claim.

In West Virginia the essential elements of a fraud case are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.' *Horton v. Tyree,* 104 W. Va. 238, 242, 139 S.E. 737 (1927) Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981)." Syl. Pt. 5, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004).

The only allegation in the Complaint that asserts any "representations" by the City is found in Paragraph Six of the Complaint, in which it is alleged that the City represented "...said building was to be demolished and the land made part of the West Pike Street Project." This allegation fails to satisfy the "material representation" requirement because it is not a statement or representation of present fact, but rather is a statement relating to the future, which is not a "material fact," and cannot be the basis of a fraud claim. "Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated upon unfulfilled promises or statements as to future events." McMillion v. Dryvit Sys., 262 Va. 463, 552 S.E.2d 364 (2001); See also McCune v. Xerox Corp., 55 F.Supp. 510 (N.D.W.Va. 1999). Affirmed in part and vacated on other grounds, 225 F.3d 654 (4th Cir. 2000). Again, the essential flaw in the Appellant's argument is confusing the validity of the easements in substitution for the City's agreement to

demolish the Rocky's Building. As noted above, no such agreement ever occurred. Moreover, as noted above, the City had no way to know that a court would declare the easements invalid. Accordingly, no fraud claim can, as a matter of law, proceed based upon such allegations.

C. The Circuit Court Properly Granted The City Summary Judgment On Appellant's Claim For "Negligent Misrepresentation."

Appellant also asserted a claim of "negligent misrepresentation" based on several West Virginia cases in which that claim is mentioned. Appellant purported to recite what it asserted are the elements of "negligent misrepresentation," but, unfortunately, provided no citation for the source of such elements.[5] Now, Appellant admits that this Court has not enumerated the elements thereof. Review of both the cited cases and the rest of the thirteen West Virginia cases in which the phrase "negligent misrepresentation" is mentioned[6] fails to reveal the source of the elements cited by the Appellant. It is not disputed that the cause of action exists in West Virginia, but the question of the elements of such action remains open. Judge Bedell found that inasmuch as there was no way to determine the elements of the claim of "negligent misrepresentation," that summary judgment was appropriate. Other states that have defined "negligent misrepresentation," however, have set forth elements that are significantly different from those cited by the Plaintiff. (See generally 37 AmJr 2nd Fraud and Deceit § 26). The common thread

[5] [Negligent Misrepresentation] It is recognized by the following elements: a false representation, the false representation must made for business purposes in the course of business, the false representation must be made without reasonable grounds for believing it to be true, the false representation must be made with the intent on inducing reliance, the plaintiff must have justifiably relied upon the representation, and damage must be caused thereby.

[6] *Barefield v. DPIC Companies,* 215 W.Va. 544, 600 S.E.2d 256
Kidd v. Mull, 215 W.Va. 151, 595 S.E.2d 308
Trafalgar House Construction Inc. v. ZMM Inc., 211 W.Va. 578, 567 S.E.2d 294
Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576
Darrisaw v. Old Colony Realty Co., 202 W.Va. 23, 501 S.E.2d 187
Martin Oil Co. v. Philadelphia Life Ins. Co., 203 W.Va. 266, 507 S.E.2d 367
Cordial v. Ernst & Young, 199 W.Va. 119, 483 S.E.2d 248
Persinger v. Peabody Coal Co, 196 W.Va. 707, 474 S.E.2d 887
Persinger v. Peabody, 209 W.Va. 707, 474 S.E.2d 887
Funeral Services By Gregory Inc. v. Bluefield Community Hospital, 186 W.Va. 424, 413 S.E.2d 79
The First National Bank of Bluefield v. Crawford, 182 W.Va. 107, 386 S.E.2d 310
James G. v. Caserta, 175 W. Va. 406, 332 S.E.2d 872
Ohio-West Virginia Co. v. C. & O. Ry Co., 97 W.Va. 61, 124 S.E.587

that runs through these cases that distinguishes "negligent misrepresentation" from "Actual Fraud," is that "negligent misrepresentation" requires proof that at the time of the representation the speaker knew the representation to be false, or at the least, that it was made with reckless indifference to its truth. See, for example Swinson v. Lords Landing Village, 300 Md. 462, 758 A2d 1008 (2000). On the other hand, Actual Fraud does not require any proof that the defendant actually knew the representations to be false. Horton v. Tyree, 104 W.Va. 238, 139 S.E. 737 (1927), Kidd v. Mull 215 W.Va. 151; 595 S.E.2d 308.

Appellant now seeks to convince the Court that negligent misrepresentation is constructive fraud by another name. It is suggested that it makes this path, because the elements of "negligent misrepresentation" adopted by other states, particularly the requirement that speaker knew the representation of fact to be false, does help its cause, because it cannot meet this element under the facts plead. Accordingly, it is attempting to now switch horses. This argument suffers from the same fatal flaw as Appellant's other actual fraud and "easement by estoppel" claims: They have not identified, even by allegation, any misrepresentation of material fact. All that is alleged is that the City may have indicated that some future event would occur. Such allegations are not sufficient to support these claims.

Alternatively, Appellant seeks to assert that, in spite of its failure to properly create or reserve the easements to itself, it can nevertheless enforce them by characterizing them as "representations" of the City by asserting that the easement agreements constituted material facts. That is, Appellant's theory appears to be that the contract and deed provisions acknowledging the easement documents constitute representations of material fact on which it can base its claims of fraud and/or negligent misrepresentation. Clearly, as correctly addressed by Judge Matish, and hereinabove, these provisions are no more than an acknowledgement of documents previously placed of record by Grandeotto itself, and over which the City had no control, and do not constitute "factual representations" by the City of any kind. Grandeotto is claiming that at the time of or prior to the conveyance the City

knew, somehow, that the easements would be ruled invalid and, in spite of such knowledge, agreed to the "subject to" language in the contract and the deed, to induce the Appellant to enter into the agreement and that these are themselves, misrepresentations.

Clearly, these facts as plead, could not constitute or form the basis for either "Actual Fraud" nor "negligent misrepresentation." First, as noted above, the sole "representation" alleged to have been made by the City was not a fact but an action to be taken in the future (i.e. the demolition of the building), is not, therefore, a present statement of fact.

Secondly, the acknowledgement of the easement documents are not material factual representations by the City of the validity of the easements, but rather a recognition that such documents were of record in the County Clerk's office. Moreover, the City had no way to know that the Court would rule them invalid and, therefore, this generally accepted prerequisite to a claim of negligent misrepresentation, must fail.

CONCLUSION

The real dispute underlying this case is the Appellant's assertion that the rights-of-way obligated the City to demolish the Rocky's Building. The City asserted, for a variety of reasons, that the easements were not valid and, even if valid, did not compel the City to demolish the building. Neither the contract of sale nor the deed contains any negotiated provision requiring, or even mentioning the demolition of the Rocky's Building. The Appellant is simply straining to find a way to enforce a nonexistent provision of a contract. But there was never any agreement to demolish the building and no breach of contract claim is available to the Appellant and, so, it has instead asserted fraud claims.

PRAYER FOR RELIEF

The Court should refuse the Petition for Appeal.

Dated this ____ day of March, 2007.

Respondent,

CITY OF CLARKSBURG
By Counsel

Gregory A. Morgan (WV Bar No. 2629)
Counsel for Respondent
363 Lee Avenue
Clarksburg, West Virginia 26301
Telephone: (304) 624-5687

CERTIFICATE OF SERVICE

I, GREGORY A. MORGAN, Counsel for Respondent, City of Clarksburg, do hereby certify that on the 30th day of March, 2007, I served the foregoing **"Brief of Appellee City of Clarksburg"** upon all counsel of record by mailing a true copy thereof via U.S. Mail in an envelope addressed as follows:

Jerry Blair, Esquire
Law Office of Jerry Blair
P.O. Box 1701
Clarksburg, WV 26302
Counsel for Plaintiffs

Gregory A. Morgan (WV State Bar No. 2629)
Counsel for City of Clarksburg

Suite One, Schroath Building
229 Washington Avenue
Clarksburg, West Virginia 26301
Telephone: (304) 624-5687

YOUNG MORGAN & CANN, PLLC
Of Counsel

G:\DOC\CITY\FOLIO\PKG GARAGE\WV-APPEAL\APPELLEE-BRF.DOC